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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-377.

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS.

Brief for the Appellee Commonwealth of Massachusetts.

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Brief for the Appellee Commonwealth of Massachusetts.

I. Opinion Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1975) 1994, 330 N.E. 2d 467 (1975).

II. Jurisdictional Statement.

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(2). The appellant challenges the constitutionality of Massachusetts' two-tier or trial *de novo* criminal procedure, specifically arguing that the system has deprived him of his Fifth, Sixth and Fourteenth Amendment rights to a jury trial. This court noted probable jurisdiction on November 11, 1975. Subsequent to the filing of appellee's motion to dismiss for want of a substantial federal question, counsel for appellee became aware of the fact that appellant, Ludwig, had waived his right to jury trial in the Norfolk County six-man jury session (App. 1). Appellee concedes that this fact was not argued in the court below nor was it previously brought to the attention of this Court. However, since this fact may affect the existence or nonexistence of a controversy and thus the jurisdiction of this Court, the Commonwealth suggests that it is its duty to bring it to the Court's attention.

Although the Supreme Judicial Court has heard this case on the merits, this Court is not bound by the state court's determination of jurisdiction. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). For this Court is bound by the Article III case or controversy requirement of the federal Constitution, while the state courts are not. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Therefore, whether a question was adequately presented and decided in the state court is itself a federal question to be determined by this Court. *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938).

Appellee suggests that appellant's waiver of jury trial presents this case to the Court in a most unusual posture. Appellant argues that he has been denied his right to jury trial, yet, when jury trial was made available to him, he waived it.

Appellee suggests that this waiver of jury trial leaves the appellant without standing to raise the jury trial issue and

indicates that the appellant has no personal interest in receiving a jury trial, thus raising a serious question as to whether this case comes before this Court as a result of the appellant's interest in the case or as a result of the attorney's interest in obtaining an advisory opinion of this Court as to the constitutionality of the two-tier system.[1]

While this case does not involve an element of collusion as was present in *Lord* v. *Veazie*, 49 U.S. (8 How.) 251, 255 (1850), appellee suggests that the controversy over the trial *de novo* system is more "feigned" than actual insofar as the appellant is concerned. Appellee suggests that this Court's admonition in *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975), is appropriate. In *Ellis* the Court indicated that, in order to demonstrate a case or controversy, an actual controversy between the parties must exist — counsel's interest alone in an advisory opinion is not sufficient to satisfy the Article III requirement.

Therefore, appellee suggests that this Court reexamine its grant of jurisdiction in this case.

III. Constitutional and Statutory Citations.

The constitutional provisions and statutes involved in this case are the following:

Fourteenth Amendment of the United States Constitution, Section I;
Article XII, Constitution of Massachusetts;
Title 28, United States Code, Section 1257;

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[1] See *Commonwealth* v. *Ludwig*, Mass. (1975) (Mass. Adv. Sh. [1975] 1974); *Whitmarsh* v. *Commonwealth*, Mass. fn. 4 (1974) (Mass. Adv. Sh. [1974] 1403, 1408-1409 fn. 4) for a listing of such cases.

Massachusetts General Laws, Chapter 218, Section 27A;
Massachusetts General Laws, Chapter 278, Section 18;
and,
Massachusetts General Laws, Chapter 278, Section 18A.

Each is set forth in Appendix A, *infra*.

IV. Questions Presented.

1. Whether the Massachusetts two-tier criminal jury procedure complies with the Fourteenth Amendment requirement that a state afford to an accused the right to a trial by jury.

2. Whether the Massachusetts two-tier criminal jury procedure violates the defendant's right not to be twice put in jeopardy as guaranteed by the Fifth Amendment of the United States Constitution.

V. Statement of the Case.

Appellant Richard I. Ludwig was complained of in the District Court of Northern Norfolk in the County of Norfolk on February 1, 1974, for violation of Mass. G.L. c. 90, § 24(2)(a), commonly referred to as "driving to endanger." (App. 3a.) On that date the appellant (defendant) pleaded not guilty and the case was continued until February 25, 1974. (App. 1a.) After a further continuance appellant filed a motion for jury trial (App. 1a) which was denied and the appellant was found guilty and fined $20 on March 11, 1974. (App. 1a.) On that date the appellant "appealed" to the District Court of Northern Norfolk six-man jury. (App. 1a.) The appellant filed a motion to dismiss in the District Court of Northern Norfolk six-man jury alleging that his District Court conviction was void for being in contravention of the Constitution of the United States. (App. 5a-6a.) The motion was denied on April 5, 1974. (App. 1a.) The appellant then waived his right to jury trial and was found guilty; payment of a $20 fine was stayed. (App. 1a.) The appellant then appealed to the Supreme Judicial Court of the Commonwealth by way of a bill of exceptions. (App. 9a-10a.) The exceptions were overruled on June 12, 1975. (App. 11a.)

On September 10, 1975, appellant filed an appeal to the United States Supreme Court from the order of the Supreme Judicial Court. This Court noted probable jurisdiction on November 11, 1975.

VI. Summary of Argument.

1. The right of jury trial in criminal cases is a fundamental right, guaranteed to defendants in state courts by virtue of the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). However, *Duncan* did not make the rule of *Callan* v. *Wilson*, 127 U.S. 540 (1888), applicable to the states; that is, first-instance-every-instance jury trial is not mandatory in all state criminal proceedings. *Duncan* enunciated a right, without definitively establishing the mode in which the right is to be afforded state defendants, and the Massachusetts mode of criminal jury trial procedure complies with the *Duncan* requirement because it is a basic and fundamental mode; that is, a mode which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense. The Massachusetts mode is clearly basic and funda-

mental because it antedated, and remained viable during, the colonial-constitutional period. Additionally, several states, including New Hampshire, Vermont, Connecticut, Rhode Island and Maine (as a District) employed a similar trial *de novo* procedure during the same period as a means of furnishing jury trial to defendants within their jurisdictions. Finally, the Massachusetts procedure is comparable to contemporary developing jury procedures in several states, and this Court has considered contemporary state practice as a principle of Fourteenth Amendment application.

2. This Court in the cases of *Duncan* v. *Louisiana*, *supra*, *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), analyzed certain traditional aspects of the jury-trial right with respect to the function and purpose of a jury in American jurisprudence. Appellee suggests that the primary purpose of the jury is to prevent governmental oppression by the interposition of the commonsense judgment of laypersons between an accused and his accuser, and by effecting community participation in the process of adjudication of guilt or innocence of an accused. Appellee further suggests that an accused in Massachusetts has an absolute right to a jury, regardless of the "petty nature" of his offense, and that the *de novo* procedure, though possibly inconvenient to some, is beneficial to the large majority of defendants and contraindicates a suggestion of governmental oppression. The Massachusetts jury procedure fulfills the purpose and function of criminal jury trial in America.

3. The appellant's alternative contention with respect to the Double Jeopardy Clause is controlled by this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Colten* v. *Kentucky*, 407 U.S. 104 (1972). In Massachusetts, as was the case in Kentucky, a defendant in a criminal trial "appeals" to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the

full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 407 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second tier is absolute, and, at the defendant's behest, the lower court proceedings are "wiped out" entirely. On the basis of this Court's previous decisions, Massachusetts suggests that its *de novo* trial procedure does not violate the Double Jeopardy Clause.

VII. Argument.

The Massachusetts Criminal Jury Procedure Adequately Complies with the Fourteenth Amendment Requirement that an Accused be Afforded the Right to Trial by Jury in State Criminal Proceedings.

A. *The Massachusetts Procedure Provides Jury Trial in a "Basic and Fundamental" Mode.*

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court, in examining a state's procedure which dispensed entirely with a jury trial in serious criminal cases,[1] stated the following:

> . . . Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. (Footnote omitted.) 391 U.S. at 149.

[1] "None of these cases [*Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)], however, dealt with a State which had purported *to dispense entirely* with a jury trial in serious criminal cases." 391 U.S. at 154-55. (Italics added.)

The Commonwealth of Massachusetts suggests, at the outset, that *Duncan* did not establish a requirement that state jury procedures conform to all previous decisions of this Court interpreting the right to jury trial guaranteed to defendants in criminal cases in federal courts by Article III of the United States Constitution and by the Sixth Amendment.[3] This argument is written upon that understanding and assumption, with the proviso that, if this Court is to hold that *Duncan* requires the states to conform to the cases that determine federal jury-trial right, then the doctrine of *Callan* v. *Wilson*, 127 U.S. 540 (1888), should be reassessed.[4] In brief, appellee argues that *Duncan* secured a right, without defining precisely the mode in which it shall be enjoyed.[5]

[3] The appellee recognizes that its position is not free from contrary interpretation and suggests that the Massachusetts Supreme Judicial Court has reviewed the alternatives and that the same are contained in succinct and fair summary in the case of *Whitmarsh* v. *Commonwealth*, *supra*, at 1412-16. We concur with the views of Mr. Justice Powell as expressed in his concurring opinion in *Johnson* v. *Louisiana*, and *Apodaca* v. *Oregon*, 406 U.S. 356, 369-77 (1972), wherein he stated:

> But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury-trial right with all its gloss. *Id.* at 371.

[4] . . . It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. . . . 391 U.S. at 158-59, n. 30.

[5] In *Jones* v. *Robbins*, 8 Gray, 329 (1857), in which the principle question involved was whether a person could be sentenced to state prison without a grand jury indictment, the Supreme Judicial Court said:

Appellee suggests that the conclusion of *Duncan* seems to derive from an examination and application of criteria which had previously served as the basis for this Court's determina-

> The last clause, which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a "capital" or "infamous punishment," excepting for the government of the army and navy, without trial by jury, is somewhat more explicit than the preceding clause, "judgment by his peers," and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to ensure his appearance and to abide the judgment of the court appealed to. this is a necessary inconvenience, as is also the delay of the trial till the sitting of such court they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. *Emerick* v. *Harris*, 1 Binn. 416. *Murphy* v. *People*, 2 Cow. 815. *Jackson* v. *Wood*, 2 Conn. 819. *Beers* v. *Beers*, 4 Conn. 535. *Sullivan* v. *Adams*, 3 Gray 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury. *Id.* at 341-42.

tion that various rights extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings were also to be protected against state action by the Fourteenth Amendment. 391 U.S. at 147-49. Specifically, the Court revisited earlier "Fourteenth Amendment" decisions, and said:

> . . . [The question] has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932);[6] whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). . . .

391 U.S. at 148-49.

The Court noted that recent cases had varied from the "essence of a scheme of ordered liberty" test (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)), and

> . . . proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is,

[6] Quoting from *Herbert* v. *Louisiana*, 272 U.S. 312, 316 (1926).

> a procedure is necessary to an Anglo-American regime of ordered liberty. . . .[7]

391 U.S. at 149-50 n. 14, and further,

> . . . Of each of these determinations [[8]] that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States. *Ibid.*

Appellee suggests that the Court then, in *Duncan*, based upon this initial definition of "fundamental," further refined the "Fourteenth Amendment" application criteria in terms of (1) historical analysis of jury trial in criminal cases and (2) contemporary practices among the states.[9] Appellee now

[7] The Court referenced to the following cases: *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Griffin* v. *California*, 380 U.S. 609 (1965); *Robinson* v. *California*, 370 U.S. 660 (1962); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948); *Pointer* v. *Texas*, 380 U.S. 400 (1965); and *Washington* v. *Texas*, 388 U.S. 14 (1967).

[8] Cases in footnote 7, *supra*.

[9] The Court reviewed the history of trial by jury in criminal cases by reference to historical treatises and legislative history of the debates and amendments surrounding various federal provisions, and indicated, as well, that the constitutions adopted by the original states were examined. 391 U.S. at 151-53. The Court also referenced contemporary state law with respect to the right to jury trial in serious criminal cases. 391 U.S. at 154.

argues and suggests to this Court that the criteria of Fourteenth Amendment *application* may be equally relevant for Fourteenth Amendment *justification*, and that the Massachusetts jury procedure is, itself, a basic and fundamental procedure which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense, as well as in the light of contemporary developing jury procedures of several American States. In brief, if the Fourteenth Amendment requires that a limitation be imposed, or a procedure be secured, upon these criteria, Massachusetts suggests that its existing procedure can be justified as adequate by the same criteria, providing a basic and fundamental right in a basic and fundamental mode.

1. The Colonial-Constitutional Experience.

The Massachusetts practice of affording criminal defendants a jury trial after preliminary adjudication by a judge (or magistrate) acting alone was first codified in 1647 when the General Court enacted a provision affording all persons the "libertye" of an:

> Appeal from the sentence of one magistrate . . . and if the point of appeal be in matter of law then to be determined by the bench; if in matter of fact by the bench and jury.

THE BOOK OF THE GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS, PUBLISHED IN CAMBRIDGE ACCORDING TO AN ORDER OF THE GENERAL COURT 2 (1660). Our research of legislation enacted since 1647 discloses that this provision has never been repealed and that the trial *de novo* procedure, with some modification, has continued in use from

that date to the present.[10] See *Whitmarsh* v. *Commonwealth*, Mass. Adv. Sh. (1974) at 1411; *Jones* v. *Robbins*, 8 Gray, 329, 341 (1857). The right of "appeal" was clearly not an unfettered one in colonial practice and has been the subject of critical commentary. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harv. L. Rev. 917, 938-44 (1926).[11]

The exact parameters of the procedure in early practice as regards magistrates' subject-matter jurisdiction and limitations upon the punishments that might be imposed are elusive and, in some respects, difficult to establish categorically in modern terms due to the fragmented approach of early legislators in codifying the criminal law and incommensurabilities arising

[10] Chapter 51, § 3 (1783), Mass. Stat.; c. 70, § 1(1831), Mass. Stat.; c. 85, § 28, c. 87, § 36, c. 138, § 1 (1836), Rev. Mass. Stat.; c. 166, § 2 (1845), Mass. Stat.; c. 31 (1849), Mass. Stat.; c. 116, § 32, and c. 173, §§ 1, 4 (1860), Mass. Gen. Stat.; c. 154, § 39, and c. 155, §§ 58, 61 (1882), Mass. Pub. Stat.; c. 396, § 47 (1893), Mass. Stat.; c. 431 (1894), Mass. Stat.; c. 490, § 3 (1897), Mass. Stat.; c. 219, § 22 (1902), Mass. Rev. Laws; c. 319 (1905), Mass. Stat.; c. 652 (1913), Mass. Stat.; and c. 216, § 4 (1929), Mass. Stat.

[11] However, we suggest that the authors' research does not seem to include the historical fact that many of the impediments to an actual exercise of the jury-trial right had been eliminated during the colonial period and prior to the framing of the Massachusetts and Federal Constitutions. See, *e.g.*, c. 4, Acts and Resolves of 1724-25 (permitting amendment to the appeal so as to preclude dismissal on technical grounds); c. 15, Acts and Resolves of 1741-42 (eliminating requirement that a writing containing the reasons of appeal be filed or produced). The latter provision reduced costs based upon the number of pages filed. See c. 23, Acts and Resolves of 1775-1776. Also, appellee has calculated that forty of the fifty-nine shillings were for jurors fees and that these fees need not have been advances, nor would have been assessable against the defendant, in the event of an acquittal. In general, see preambles to these ameliorative acts for reflection of a legislative concern that the appeal right be unfettered.

from social, economic, and technological change. However, after a review of the legislation of the colonial and constitutional periods, it appears fair to state that, at least with respect to the core offenses against the public order and peace, against property, and against persons, the matters entrusted to the trial *de novo* procedure then, and those entrusted to the procedure now, are quite comparable. For example, during the colonial and constitutional experience, justices of the peace, sitting outside the General Sessions of the Peace, were authorized to proceed to a preliminary adjudication in cases where the offense was: participation in a riotous or tumultuous assembly where a building was torn down;[12] a liquor law violation;[13] an assault and battery not of a "high and aggravated nature";[14] receiving stolen government property;[15] or a petty larceny or offense of similar degree.[16]

[12] Chapter 17, Acts and Resolves of 1750-51 (maximum punishment: whipping, one year imprisonment in the county house of corrections at hard labor, and another public whipping every three months during the term of imprisonment); c. 26, Laws and Resolves of 1794 (re-enactment with some modification). See *Commonwealth* v. *Twombly*, Boston Municipal Court 1830, reported in Thatcher's Criminal Cases 225 (1845) (Thatcher, J., reviewing common-law and legislative history of the offense.)

[13] Chapter 6, Acts and Resolves of 1742-43 (maximum fine, twenty pounds sterling).

[14] Chapter 51, Laws and Resolves of 1783.

[15] Chapter 36, Acts and Resolves of 1776-77 (maximum fine: three times value of property stolen).

[16] The Book of the General Laws and Libertyes of the Inhabitants of Massachusetts, *supra*, at 7 (maximum punishment in 1660: whipping and fine of up to forty shillings; but, by the end of the constitutional period, the maximum fine had been increased to twelve hundred eighty shillings. Chapter 37, Acts and Resolves of 1779-80).

Today, the district and municipal courts of Massachusetts, the successor courts to the General Sessions of the Peace, continue to have jurisdiction over these offenses which still are among those that mark the jurisdictional limits of the authority of these courts. See Mass. G.L. c. 218, § 26; c. 267, § 7; c. 265, § 13A; c. 266, §§ 30, 60.

The New Hampshire two-tier jury procedure has been traced by that state's Supreme Court to a 1646 law of the Massachusetts Colony, *State* v. *Jackson*, 69 N.H. 511 (1898), although it is clear that the New Hampshire practice enjoys a history separate and apart from the Massachusetts law:

> . . . In 1679, immediately after Charles II discontinued the jurisdiction of Massachusetts in the New Hampshire territory, the general assembly of the Province of New Hampshire enacted, "That Any one of the Council [that is, the council provided for by the King's Commission to President Cutt] may hear & determine such smaller Thefts & pilferings, as exceed not the damage or fine of fforty shillings; or penalty of Stocking or Whipping, not exceeding Ten stripes; or only legal admonition, as he shal see cause; Saving liberty of Appeal to the Delinquent." 1 Laws, *ed.* of Batchellor, editor and compiler of Early Province and State Papers, *p.* 17, *s.* 7. By another enactment this jurisdiction was extended to all criminal cases

Our research has disclosed that long-term imprisonment was rarely imposed in colonial Massachusetts. The one exception appears to be the three-year term authorized for mailing a threatening letter to extort. Chapter 7, Acts and Resolves 1749-50. Otherwise, excepting for the imposition of heavier fines, the penalty of next severity (outside of the jurisdiction of a justice of the peace) appears to have been the death penalty. See, *e.g.*, c. 2, Acts and Resolves of 1721-22 (death penalty for second offense of trading with the Indians); and c. 18, Acts and Resolves 1736-37 (death penalty for third offense of theft).

in which the punishment did not exceed that above mentioned. *Ib.*, *p.* 22, *s.* 24.

69 N.H. at 514.

Several decisions of the New Hampshire court seem to best describe the office of the justice of the peace in New Hampshire, the criminal jurisdiction of the justices at the time of the formation of the New Hampshire Constitution in 1784, and the modification of the jurisdiction of the justices during the period following the revolution. See *Opinion of the Justices*, 41 N.H. 550 (1860); *State* v. *Ray*, 63 N.H. 406 (1885); *State* v. *Griffin*, 66 N.H. 326 (1890); *State* v. *Gerry*, 68 N.H. 495 (1896); *State* v. *Jackson*, *supra*; *Wilmarth* v. *King*, 74 N.H. 512 (1908); *State* v. *Ring*, 106 N.H. 509 (1965); *State* v. *Despres*, 107 N.H. 297 (1966). And, although the cases have concerned, in large measure, the scope of jurisdictional authority which may be delegated to the municipal or district court in view of Article XV of the Bill of Rights of the New Hampshire Constitution,[17] it seems fair to say that the New Hampshire court has never questioned the historical precedent of two-tier criminal adjudication, "provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort . . . ," *Opinion of the Justices*, 41 N.H. at 552, and "[f]inal judgment cannot be enforced for the commission of any police offence, however trivial, until the appellant has been convicted by a jury of his peers." *State* v. *Ray*, 63 N.H. at 407.

[17] The provision of the constitution relied upon is as follows:

> [N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

N.H. Const., Bill of Rights, art. 15.

In and prior to 1784, a New Hampshire justice of the peace had general authority to try and determine those criminal offenses that were punishable by a fine not exceeding forty shillings, by whipping or by sitting in the stocks. *Wilmarth* v. *King*, 74 N.H. at 513. However, specific statutes authorizing the punishment of six months' imprisonment by a justice of the peace are to be found, even antedating the constitution. New Hampshire Laws, 63, 64, 65 (1780). See *Wilmarth* v. *King*, *supra*. See also New Hampshire Laws, c. 45, §§ 3, 4 (1828). Finally, the appellee suggests that the nature of the following offenses within the jurisdiction of the justices of the peace should be noted (these examples all being laws of 1771 cited in *State* v. *Jackson*, 69 N.H. at 516-17): drunkenness; stealing (where the damage did not exceed forty shillings); "affrayers, rioters, disturbers or breakers of the peace . . ."; striking or smiting another; and "assaulting a woman in the fields, streets or lanes. . . ."[18]

Decisions of the Supreme Court of Vermont, and some available portions of early Vermont legislation, establish that two-tier criminal jury procedures were a part of the constitutional experience in Vermont.

> The first constitution of Vermont was adopted in 1777. The act of the legislature of 1786 empowered justices of the peace to try certain pleas and actions of a criminal nature, and limited their jurisdiction. It also provided that every person . . . aggrieved by the sentence of a justice in a criminal action, might, on giving security, remove the cause by *certiorari* to the supreme court

[18] The fines and penalties for these offenses are contained in the opinion of the court at 69 N.H. 516-17.

> (where there was then a trial by jury,) there to be tried on the merits. The act of 1789 allowed an appeal from the judgment and sentence of a justice to the county court in all criminal causes.

State v. *Peterson*, 41 Vt. 504, 520-21 (1869). The "county court" was a jury court. See, "An Act Regulating Juries and Jurors, 22 Feb. 1779," reprinted in XII Laws of Vermont 1777-1780, at 117 (Soule, ed. 1964). See also *Lincoln* v. *Smith*, 27 Vt. 328 (1855); Act of June 21, 1782, reprinted in XIII Laws of Vermont 1781-1784, at 102-03 (Williams, ed. 1965).

Our research discloses that the states of Connecticut and Rhode Island and the District of Maine similarly employed a trial *de novo* procedure for furnishing, during the colonial period, jury trial to criminal defendants who were tried first before a magistrate or justice of the peace without a jury. In Connecticut that procedure seems to date from at least 1702. See *Goddard* v. *State*, 12 Conn. 448, 454 (1838); Colonial Records of Connecticut 1689-1706, at 545. In Rhode Island our earliest reference is 1718. Acts and Laws of Rhode Island, 1663-1767, at 36, 44 (1767).[19] And, in the District of Maine, 1783. See *State* v. *Sklar*, 317 A. 2d 160, 170 (Me. 1974); *Johnson's Case*, 1 Me. 230 (1821). There is also evidence that

[19] Again, the appellee requests that the Court note the nature of the offenses for which the trial *de novo* procedure was provided in jurisdictions where the defendant was given a general right to a trial by jury subsequent to a preliminary adjudication by a magistrate or magistrates. For further example, in the colonial practice of Rhode Island, a preliminary summary adjudication was provided for in cases of a theft not exceeding ten pounds sterling (for which the defendant might be punished by "whipping, fining, and banishing" just as if the conviction had been by a jury verdict at the General Sessions of the Peace), assault and battery, and firing a gun or throwing fireworks into a crowd. Acts and Laws of Rhode Island 1663-1767, at 41, 64, 120 (1767).

a trial *de novo* procedure for providing a jury trial was employed in some form in Pennsylvania, Virginia and Delaware during the colonial and constitutional periods.[20]

[20] Our research of Pennsylvania legislation of the colonial and constitutional periods does not disclose a uniform jury practice in the case of all criminal offenses. There was, however, provision for a general right to appeal to the Quarter Sessions for a jury trial in quasi-civil proceedings. Act of February 21, 1736, reprinted at 4 Statutes at Large of Pennsylvania 291 (limiting the jurisdiction of justices of the peace at five pounds sterling, with a right of appeal to a jury in cases involving over forty shillings).

In addition, a trial *de novo* procedure for furnishing a jury trial was, with fair consistency, provided for criminal offenses of intermediate seriousness. See, *e.g.*, Act of August 21, 1719, reprinted at 3 Statutes at Large of Pennsylvania 229, 233-34; Act of February 24, 1721, reprinted at 3 Statutes at Large of Pennsylvania 246 (petty larceny punishable by twenty shilling fine, whipping and imprisonment); Act of August 15, 1730, reprinted at 4 Statutes at Large of Pennsylvania 194 (blocking a river); Act of October 4, 1788, reprinted at 13 Statutes at Large of Pennsylvania 160 (commercial fishing law violations punishable by a five-pound fine or two months' imprisonment); Act of April 22, 1794, reprinted at 15 Statutes at Large of Pennsylvania 110, 115-16 (keeping a gambling establishment punishable by a fine of twenty-six dollars).

The use of the trial *de novo* procedure for furnishing a jury trial where it is constitutionally required in quasi-civil actions has been considered and affirmed by the Pennsylvania Supreme Court. *Emerick* v. *Harris*, *1 Binney*, 416 (1808).

The cornerstone of Virginia's criminal justice system was the monthly court which was formed in 1623 with the appointment of eight designated commissioners, of whom three were to be a quorum. Act of March 20, 1629, reprinted at 1 Hening's Statutes at Large 132 (1823); Act of March 1, 1631, reprinted at 1 Hening's Statutes at Large 168-69 (increasing jurisdiction to causes involving up to five pounds sterling excepting those involving life or limb). In 1642 the monthly courts became county courts and a single commissioner was given cognizance of causes involving twenty shillings or two hundred pounds of tobacco or less. Act of June, 1642, reprinted at 1 Hening's Statutes at Large 273. Also, in 1642, all persons were given what appears to have been an unqualified right to a jury trial. *Ibid.*

In 1645 the Virginia "county courts" were given jurisdiction of all cases and ordered to make jury trials available. Act of November 20, 1645, reprinted at 1 Hening's Statutes at Large 303. It is not clear how the last

In partial summary, although there may have been no strict consensus among the colonies as to the mode in which the right to jury trial was to be afforded, the trial *de novo* mode for offenses of intermediate seriousness was a very substantial

three acts were reconciled in practice. Possibly, a trial *de novo* procedure had already been implimented. In any event, a trial *de novo* procedure for furnishing a jury trial was formally implemented in 1658. Act of March 13, 1658, reprinted at 1 Hening's Statutes at Large 435. Appellee notes that the subject matter jurisdiction of one and two commissioners at a preliminary adjudication was increased to three hundred fifty and one thousand pounds of tobacco respectively with the implementation of these procedures. We must further note that the Virginia legislation during this period did not distinguish between criminal and civil actions procedurally, all penal laws being enforced through *qui tam* proceedings involving informers as well as victims.

This practice was to be short-lived, however. In 1661 a new colonial government, averring a reverence for the common law of England, adopted that law, repealed all previous laws, provided that the commissioners were from then on to be called "justices of the peace" and have the same powers as English justices, and reduced their jurisdiction in summary proceedings to causes involving twenty shillings or two hundred pounds of tobacco, or less, in which causes their judgment was to be "final." Acts of March 23, 1661, reprinted at 2 Hening's Statutes at Large 41, 61-62, 72. It does not appear that Virginia again established a trial *de novo* procedure until the post-constitutional period.

The post-constitutional procedure was held valid under the Sixth Amendment and the Virginia Constitution on the ground that the right to a jury trial is afforded if an unfettered right of appeal is provided. *Brown* v. *Epps*, 91 Va. 726 (1895) (distinguishing *Callan* v. *Wilson*, *supra*, on the ground that Article III, Section 2, of the United States Constitution requires that all federal trials "shall be by jury" which literally leaves no room for any adjudication in the absence of a jury).

Information on early Delaware practice is quite sparse. Much of the early penal legislation is somewhat cryptic. It is clear that the Delaware justices of the peace had jurisdiction over some offenses of intermediate seriousness, and although a right to appeal for a trial by jury in the quarter sessions is not expressly given for all offenses, the right is expressly afforded in the more comprehensive legislative enactments and in language that suggests the right may have been generally available. Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1700-1749, at 139, 159, 184, 194, 218 (Franklin and Hall, eds. 1752); Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1753-1762, at 146, 316, 321, 323 (Adams, ed. 1763) (with October 1763 Session to October 1774 Session Supplements).

Records of legislative enactments, or case law, or both, concerning the colonial and constitutional periods were available to appellee for New York, Maryland, New Jersey and Georgia. A search of this material did not disclose the use of a trial *de novo* procedure for providing a jury trial or a provision for a general right to a jury trial in these states. Complete records of the colonial practice of South Carolina and North Carolina were not available. However, it is known that North Carolina provided a trial *de novo* procedure for offenses of intermediate seriousness as early as 1868. See *State* v. *Powell*, 86 N.C. 640, 642 (1882).

part of the colonial experience and was, appellee suggests, clearly within the understanding of the framers of our Federal Constitution. Indeed, we suggest that the *de novo* mode was within the experience and understanding of those whose precepts as regards the jury-trial right were the more developed. in the "*de novo* states" it appears that jury trial was provided for *all* offenses, petty and serious.

2. Contemporary State Practice.

The contemporary practices of the states with respect to jury trial have been the subject of examination by this Court in several recent cases, notably: *Duncan* v. *Louisiana*, *supra*; *North Carolina* v. *Pearce*, *supra*; *Baldwin* v. *New York*, 399 U.S. 66 (1970); *Williams* v. *Florida*, *supra*; *Apodaca* v. *Oregon*, *supra*; and *Colten* v. *Kentucky*, *supra*. And our examination of the parties' briefs in these cases indicates that the Court has received considerable analysis, on a state-by-state basis, of the criminal jury procedures of most of the states. See, *e.g.*, *Duncan* v. *Louisiana*, *supra*; Brief for Appellant, pp. 3a-8a; Brief for Appellee, pp. 101-113.

The appellee has examined contemporary state practice and suggests that a *de novo* procedure, comparable to the Massa-

chusetts procedure, is currently being utilized by several states including, at least Arizona,[21] Arkansas,[22] Alabama,[23] Kansas,[24] North Carolina,[25] New Hampshire,[26] Pennsylvania[27] and

[21] Ariz. Rev. Stat. §§ 22-371 through 22-374 establish the *de novo* apeal to the superior court from the final judgment of a justice or police court; however, the "appeal" is not always *de novo*, *i.e.*, if a transcript of the proceedings in the lower court has been maintained, the "appeal" may be upon that record based upon the superior court's evaluation of the sufficiency and condition of that record. The jurisdiction of the justice of the peace courts is contained in Ariz. Rev. Stat. § 22-301.

[22] Ark. Stat. §§ 44-115, -116, -501 and -509 establish the *de novo* procedure of appeal to the circuit court. See *Cableton* v. *State*, 243 Ark. 351, 359 (1967). However, the initial jurisdiction of the lower "tier" appears to be restricted to violations of municipal by-laws and ordinances. See Ark. Stat. §§ 44-115, -116.

[23] See Ala. Const. art. I, §§ 6, 11 (1901). The jurisdiction of the first tier (the "county court") is defined in Ala. Code Ann. tit. 13, § 321; see *Leonard* v. *State*, 43 Ala. App. 454 (1966), and Ala. Code Ann. tit. 13, § 326. The latter citation appears to define the *de novo* right. Appellee also notes that second degree manslaughter appears to be a misdemeanor in Alabama and subject to adjudication, in the first instance, at the lower court level without a jury.

[24] The *de novo* procedure appears in Kan. Stat. Ann. §§ 22-3609, -3610, reenacted, c. 179, Acts of 1975. See *State* v. *Parker*, 213, Kan. 229, 230, 233, 235 (1973).

[25] N.C. Gen. Stat. §§ 7A-196, -271, -272.

[26] The trial *de novo* procedure and enabling legislation is explained in *State* v. *Despres*, 107 N.H. 297 (1966). See N.H. Rev. Stat. §§ 502:18, 502A:11, 502A:12. The jurisdiction of the district or municipal first tier is limited to crimes for which the maximum penalty is fine not exceeding one thousand dollars or imprisonment not exceeding one year or both. *Ibid.*

[27] Pa. Code tit. 234, Rules 51, 67, 6001, 6006, 6010. Pa. R. Crim. P. 67(e), tit. 19. The municipal court has jurisdiction of all criminal offenses where the punishment that might be imposed is five years or less. After the

Virginia.[28] Appellee acknowledges that the ostensible jurisdiction of the Massachusetts "first tier" seems to represent (with the possible exception of Alabama) the extreme with respect to powers of fines and incarceration. However, the concept of *de novo* adjudication, in a procedure comparable to the Massachusetts system in respects other than potential sentencing, seems to be recognized as a legitimate form of jury procedure by a substantial number of states.[29]

imposition of sentence the municipal court judge shall notify the defendant of his right to appeal for a trial *de novo* by jury. If the defendant does appeal, the district attorney must proceed to a grand jury and, upon return of an indictment, proceedings continue as in other cases involving indictable offenses.

[28] Va. Code Ann. §§ 16.1-123, -124, -125, -132, -136. See *Commonwealth* v. *Bass*, 113 Va. 760 (1912). In Virginia, any person convicted in a court not of record, of an offense not felonious, has a right to a *de novo* jury trial in a circuit court (even if the conviction resulted from guilty plea, rather than trial).

[29] Appellee has suggested, and, hopefully established, that the subject matter or "core offenses" cognizable by colonial justices of the peace are substantially comparable to the subject matter jurisdiction of the present Massachusetts District Courts and the Boston Municipal Court. It does appear, however, that the *ostensible* authority of the modern justice has been substantially expanded in terms of money fine amount and potential time of incarceration. This is, of course, an important consideration, especially in view of the recognized distinction between "petty" and "serious" offenses and the doctrine of *Callan* v. *Wilson*, *supra*. Appellee argues, however, that the practical expansion of "lower tier" jurisdiction is justified by social, technological and procedural advance, as well as by need, but, further, that the *actual* expansion is far less than the *apparent* expansion.

The expansion of magistrates' jurisdiction was examined by the New Hampshire Supreme Court in *State* v. *Jackson*, *supra*. That court noted that, with some exceptions, in 1777 the largest fine which a New Hampshire justice was authorized to impose was forty shillings, and that the longest definite term of imprisonment was three months, ". . . authority being given

B. *The Massachusetts Jury Procedure Effects this Court's Enunciation of the Purpose and Function of Jury Trial in America.*

In addition to an examination of historical and contemporary practices among the states, the Court, in recent cases touching upon the nature of the jury right, has studied the purpose and function of the jury in contemporary society. In *Duncan* v. *Louisiana*, *supra*, the Court noted:

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in certain cases to imprison in the house of correction for an indefinite term; . . ." 69 N.H. at 518. That court, in 1898, undertook to interpret the 1777 sentencing power in terms of subsequent authority of the justices in 1791, 1799, 1805, 1815, 1822, etc. The interpretation and examination took this form:

> In 1781, the Spanish milled dollar reckoned as six shillings, and other silver and gold in proportion, were made legal tender on all contracts made after that time, and for all debts contracted prior to the last day of January, 1777. Laws, *ed.* 1789, *pp.* 185, 187. The constitution provides that, in all cases where sums of money are mentioned in it, "the value thereof shall be computed in silver at six shillings and eight pence per ounce." Laws, *ed.* 1789, *p.* 30. Const., *art.* 96. It seems from the act of February 12, 1785, that the value of gold at that time was five pounds six shillings eight pence per ounce, or, when compared with silver, as sixteen to one. Laws, *ed.* 1780, *p.* 338; *ed.* 1789, *p.* 187. The money of account was changed from the English system to the decimal or United States system in 1792 (Act of Congress of April 2, 1792, *c.* 16, *s.* 20; Laws, *ed.* 1797, *p.* 267); and the first United States silver dollar was coined in 1794. This dollar contained 371¼ grains of pure silver, — about the same quantity as the Spanish milled dollar. According to the rule of the constitution, forty shillings equaled six ounces of silver, — a quantity sufficient to make seven and three fourth United States Silver dollars.

69 N.H. at 518-19.

Appellee includes this New Hampshire analysis primarily to establish that a dollar-for-dollar comparison is difficult, if not totally impractical. Nevertheless, appellee asks that this Court, if such comparison be made, take note

> . . . Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* [*Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)] took no note of past or current developments regarding jury trials, [and] did not consider its purposes and functions. . . . 391 U.S. at 155.

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of the fact that the Chief Judge of the Vermont County Court was paid at the rate of ten shillings per day in 1780, and that an attorney in that court received for his labor four shillings per day. "An Act for Regulating Fees Novr. 3RD 1780" reprinted in XII Laws of Vermont 1777-1780, at 206. (Soule, ed. 1964).

And, should this Court compare the extreme of the present authority of a Massachusetts District Court Judge to imprison, the appellees ask that the following statement of the Rhode Island Supreme Court be noted:

> Suffice it to say that at the time of the adoption of the State constitution [1843] imprisonment in the State prison was the gravest punishment known to the law of the State for crimes less than capital crimes, and that it had succeeded to the former punishments of whipping, branding, and standing in the pillory.

State v. *Nichols*, 27 R.I. 69, 82 (1905).

Moreover, although the District Court has jurisdiction over all felonies punishable by imprisonment in the State prison for up to five years, in fact the District Court may sentence only to the local jail or House of Correction in which the maximum term of imprisonment is two and one-half years. Mass. G.L. c. 218, § 27 (1958); c. 279, § 23.

In summary, appellee argues that the propriety of the present Massachusetts system should not be diluted because of ostensible, rather than actual, enlargements of jurisdiction as originally entrusted to justices of the peace. Appellee asks the Court to recognize that the Massachusetts procedure is not an imaginary scheme, but a functioning and developing process with a three-hundred-year history, presently accomodating in excess of one million criminal matters each year. *Seventeenth Annual Report to the Justices of the Supreme Judicial Court* (1973) at 52.

The Court then stated the purpose (and its components) of the guarantee of jury trial in the Federal and State Constitutions: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." (Citing *Singer* v. *United States*, 380 U.S. 24, 31 (1965).) 391 U.S. at 155. The Court continued with categories of potential governmental oppression based upon history and experience:

1. unfounded criminal charges brought to eliminate enemies;
2. judges too responsive to the voice of higher authority;
3. protection against arbitrary action;
4. the corrupt and overzealous prosecutor;
5. the complaint, biased, or eccentric judge;
6. the exercise of plenary powers over the life and liberty of the citizen by one judge or a group of judges;
7. unchecked power; and,
8. arbitrary law enforcement,

concluding, *inter alia*, that: "Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." 391 U.S. at 158. See also *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered the question whether the constitutional guarantee of a trial by "jury" necessarily required trial by exactly twelve persons, rather than some lesser number — in *Williams*, six. 399 U.S. at 86. In deciding the issue the Court stated:

> . . . The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. 399 U.S. at 99-100.

The Court then reviewed the statement of jury purpose contained in *Duncan*, concluding:

> . . . Given this purpose [to prevent oppression by the government], the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. 399 U.S. at 100.

The Court determined that there was little reason to think that these goals are *in any meaningful sense* less likely to be achieved when the jury numbers six, than when it numbers twelve. *Ibid.*

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), this Court considered the question whether conviction of crime by a less-than-unanimous jury violated the right to trial by jury in criminal cases. 406 U.S. at 406. The Court examined relevant constitutional history, noting that conflicting inferences could be drawn therefrom, and stated:

> . . . that in determining what is meant by a jury we must turn to other than purely historical considerations. 406 U.S. at 410.

The Court's inquiry then explicitly focused upon the function served by the jury in contemporary society, and the enunciated jury "purpose" of *Duncan* and *Williams* was examined. The Court concluded that "[a] requirement of unanimity . . . *does not materially contribute* to the exercise of this commonsense judgment." *Ibid.* (Emphasis added.)

In view of the "purpose and function" analyses of *Duncan*, *Williams*, and *Apodaca*, appellee suggests that it is appropriate in the instant case to examine the Massachusetts jury procedure to determine whether or not the "essential feature" of the jury is effected. The issue is governmental oppression and whether or not the Massachusetts system, in a meaningful sense, prevents such oppression by the interposition of the commonsense judgment of a body of laypersons between the accused and his accuser.[30]

[30] An examination of the trial *de novo* cases decided in the state courts has provided little assistance. In *Manns* v. *Commonwealth*, 213 Va. 233 (1972), the Virginia court made no examination of history, nor analysis of jury purpose, in its consideration of this question. The court seemed merely to reject the argument that *Callan* v. *Wilson* became applicable to the states via *Duncan* v. *Louisiana*, citing to footnote 30 and the dissent of Mr. Justice Fortas. Also, in *State* v. *Halliday*, 109 R.I. 93 (1971), no examination of history or jury purpose is apparent; rather, the Rhode Island court concluded on the basis of *Duncan*, and *Baldwin* v. *New York*, 399 U.S. 66 (1970), that the "mandate of *Callan* is applicable to the states." 109 R.I. at 103.

Cases decided in federal courts bear only indirectly upon potential governmental oppression and even less directly upon the question of jury purpose. In *Lemieux* v. *Robbins*, 414 F. 2d 353 (1st Cir. 1969) (cited with approval by the court in *State* v. *Sparrow*, 276 N.C. 499 (1970)), the Circuit Court examined the trial *de novo* procedure in the state of Maine on the basis of a challenge deriving from this Court's determination of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). In its opinion, the Circuit Court made the following statement with respect to the practical nature of the *de novo* procedure:

> . . . [A] defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all. [Footnote omitted.] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity. 414 F. 2d at 355.

Although the statement is not explicitly addressed to the issue of governmental oppression, the appellee suggests that the Circuit Court's observation implicitly contraindicates government oppression in the *de novo* process.

In *Manns* v. *Koontz*, 451 F. 2d 1344 (4th Cir. 1971), the Circuit Court affirmed a federal district court's refusal to grant relief on the basis of a claim that the Virginia *de novo* procedure was violative of *Duncan*. The basis of dismissal seems to have clearly been 28 U.S.C. § 2283 and *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Court did consider the element of irreparable injury and the prosecutorial-oppressive criteria of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), in reaching its decision. Appellee suggests that the Court's action at least implicitly contraindicates governmental oppression in the Virginia procedure.

[31] In *Callan* v. *Wilson*, 127 U.S. 540 (1888), this Court rejected a hypothetical system based upon the ". . . power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury." 127 U.S. at 555. It is clear that several successive convictions are neither theoretically possible nor actually permissible in the Commonwealth of Massachusetts. The "appeal" and jury trial may be elected immediately by a convicted district court defendant and, as such, should be distinguished from the *possibility* of prolonged litigation which was suggested by this Court in *Callan*.

An examination of the Massachusetts jury system discloses that an accused has an absolute right to a body of laymen whose judgment will stand between himself and his accuser after a preliminary adjudication at which he need do nothing.[31] In fact, the defendant obtains the distinct advantage of being able to discover the prosecution's case without having to disclose his own, while in no way jeopardizing his

right to trial by jury. Although he cannot as of right *waive* a trial at the district court level, *cf. Lemieux* v. *Robbins*, *supra*, at 355, n. 4, he can certainly *avoid* a trial by merely listening to the Commonwealth's evidence without offering his own and, if found guilty, appeal. Or he may simply admit to a finding and then appeal for a *de novo* trial. Therefore, contrary to the situation in *Breed* v. *Jones*, 421 U.S. 519 (1975), it is the defendant's choice as to the amount of his participation in the first proceeding and as to whether he wishes to opt for a second proceeding. On appeal, the District or Municipal Court proceeding becomes a nullity: the appeal "wipes out the lower court action entirely." The defendant then has a second opportunity for acquittal, if he so chooses. *Mann* v. *Commonwealth*, 359 Mass. 661 (1971), at 666.

Admittedly, the *de novo* procedure effects a minimal degree of restriction and, arguably, inconvenience.[32] We see, however, the question as one of oppression, and not of inconvenience: can it be said that the *de novo* procedure materially dilutes the function of a jury when the defendant may listen to the government's case, without disclosing his own, and have, immediately thereafter and of absolute right, the further community participation in the process of adjudication of guilt or innocence and the interposition of commonsense judgment of a group of laymen — and, at the same time have the possibility of immediate acquittal? We suggest that the answer should be in the negative. The function of the jury is preserved.

Appellant asserts that this Court has rejected appellee's theory that the *de novo* system offers a defendant the "full

[32] The Commonwealth justifies the inconvenience by pointing out that the District Courts are designed, in the interest of both the defendant and the Commonwealth, to provide speedier and less costly adjudications than are possible on the second level of the Massachusetts two-tier system. The *de novo* system alleviates the burden in the Superior Court, where the full range of constitutional guarantees is available to all on appeal. *Cf. Colten* v. *Kentucky*, 407 U.S. 104, 114 (1972).

panoply of constitutional rights" as guaranteed by due process. Appellant's Brief, p. 55. However, appellant's reliance on *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), is inapposite. In *Ward*, the defendant faced trial for traffic violations in the first instance before the mayor of the town. The fines imposed for such violations constituted a major portion of the village income. This situation was one "'. . . in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'" 409 U.S. at 60. Within this framework, the court held that the *eventual* offer of an *impartial* adjudication was not constitutionally acceptable. However, in the instant case there is no allegation that an initial adjudication before a District Court judge is not made by an impartial and disinterested tribunal.

C. *The Massachusetts Criminal Jury Procedure Complies with the Fourteenth Amendment's Ban Against "Double Jeopardy."*

The Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969). This is, appellee acknowledges, a fundamental guarantee. *Id.* at 795. However, as the Court noted in *North Carolina* v. *Pearce*, 395 U.S. 711, 719-20 (1969):

> At least since 1896, when *United States* v. *Ball*, 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. "The principle that this provision does not preclude the Government's

> retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U.S. 463, 465. (Footnote omitted.)

And further:

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. *Id.* at 720-21.

This rationale was applied to a two-tier system of criminal justice in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). There the appellant had been convicted of a misdemeanor in the Kentucky two-tier system. On appeal to this Court, the appellant challenged, *inter alia*, the constitutionality of the enhanced penalty he received after conviction at his "second-tier" trial. As to the appellant's double jeopardy argument, this Court stated:

this Court said:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S. at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course,

> the situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. 407 U.S. at 119-20.

Appellee suggests that, in determining that the imposition of a more severe penalty upon reconviction in Kentucky's two-tier system was constitutionally permissible, this Court held, *a fortiori*, that retrial and reconviction in the Kentucky two-tier system were constitutionally permissible.

In Massachusetts, as was the case in Kentucky, the defendant in a criminal trial "appeals" to the second level of the two-

two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 407 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second-tier is absolute and, at the defendant's behest, the lower court proceedings are "wipe[d] out . . . entirely." *Mann* v. *Commonwealth*, 359 Mass. at 666. See *Colten* v. *Kentucky*, 407 U.S. at 113 n. 7.

Thus, appellee suggests, the Massachusetts *de novo* trial procedure does not violate the double jeopardy ban of the Fourteenth Amendment.

Conclusion.

For the reasons stated above, the appellee suggests that this Court should conclude that the appellant's claim is without merit in that, under Massachusetts procedure, he was afforded a jury trial in compliance with and within the requirements of the Fourteenth Amendment.

Respectfully submitted,*

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*Counsel acknowledges that substantial portions of this brief have been excerpted from the Commonwealth's brief in a related matter, *Costarelli* v. *Massachusetts*, which was prepared by former Assistant Attorney General David A. Mills.

IX. Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment of the United States Constitution, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Constitution of Massachusetts.

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Title 28, United States Code, Section 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Massachusetts General Laws, Chapter 218, Section 27A:

[Trial by jury of six in certain courts.]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section

twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk County found guilty of an offense of crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such an appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of

the superior court has and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes

of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

Massachusetts General Laws, Chapter 278, Section 18.

[Appeals in criminal cases to superior courts; recognizance.]
Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the

appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk County or in municipal court of Boston.]
Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve

superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.